INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245, Complainant, and **PACIFIC GAS & ELECTRIC COMPANY,** Respondent. Re: Arbitration Case 276. Termination	**Opinion & Decision** **of** **Board of Arbitration** -oOo- Orinda, California June 4, 2008

BOARD OF ARBITRATION

Sam Tamimi, Union Board Member

Dan Lockwood, Union Board Member

Margaret Short, Company Board Member

Joseph De Martini, Company Board Member

Barbara Chvany, Neutral Chairperson

APPEARANCES

On Behalf of the Union:

Sanford N. Nathan, Esq.
Leonard Carder, LLP
1766 Chisholm Road
McPherson, Kansas 67460-7049

On Behalf of the Employer:

Stacy A. Campos, Esq.
Pacific Gas & Electric Co.
One Market St., Spear Tower, Ste. #400
San Francisco, CA 94105

INTRODUCTION

This dispute arises under the Labor Agreement ("the Agreement") between the above-captioned Parties (JX 1). Pursuant to the Agreement, a Board of Arbitration was appointed and a hearing was conducted on November 30, 2006 and February 6, 2007, in San Francisco, California (JX 2; TR 6, 149). At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant evidence and argument. A verbatim transcript of the proceedings was taken.[1] In the Submission Agreement (JX 2), the Parties stipulated that the grievance at issue was pursued through the grievance procedure contained in the Labor Agreement, thus the matter is properly before the Board for final and binding decision.

Grievant H was hired May 13, 1988 (TR 12, 203; JX 3, p. 11). He was terminated effective January 17, 2006, after last having worked on November 17, 2005 (TR 12; JX 3, p. 23). At the time of the events at issue, he held the position of traveling utility worker at Diablo Canyon Power Plant ("DCPP"), a facility regulated by the U. S. Nuclear Regulatory Commission ("NRC") (TR 12, 140). The termination was grieved on January 25, 2006 (TR 12; JX 3, p. 22). The grievance was not resolved in the prior steps of the grievance procedure, leading to this arbitration proceeding (TR 12; JX 3, pp. 1-21).

ISSUE

Was the Grievant terminated for just cause? If not, what shall be the remedy? (JX 2; TR 11)

---

[1] References to the transcript are cited herein as (TR #); references to Joint Exhibits and Union Exhibits are cited as (JX #) and (UX #), respectively.

REMEDY REQUESTED

The Union seeks the Grievant's reinstatement to his former position with a full back pay, benefits and all rights restored (TR 11; Un. Brf. 45). The Employer seeks denial of the grievance in its entirety (*Id.*).

RELEVANT AGREEMENT PROVISIONS

> TITLE 7.1 MANAGEMENT OF COMPANY
> 7.1 The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend and discipline or discharge employees for just cause; ... (JX 1, p. 5)

PERTINENT COMPANY RULES

The Employee Conduct Summary prohibits employees from "[e]ngaging in actual or threatened violent behavior" and provides that "VIOLATION OF THE EMPLOYEE CONDUCT STANDARDS WILL SUBJECT ANY EMPLOYEE TO DISCIPLINARY ACTION, UP TO AND INCLUDING DISCHARGE" (emphasis in original). (JX 3, p. 34)

BACKGROUND

Basis for Termination:

The Company terminated the Grievant for allegedly making a verbal threat to Physician's Assistant Craig Gallagher at the DCPP Medical Facility on November 17, 2005,[2] in violation of the

[2] All dates hereinafter are 2005 unless otherwise specified.

Utility Employee Conduct Summary, Utility Standard Practice 735.6-1, as well as the Corporate Policy Handbook, Standards for Personal Conduct and Business Decisions (JX 3, pp. 23-24, 34).

Background:

– Prior Injury –

Earlier in his career with the Company, while in operations, the Grievant suffered a work-related injury to his back (TR 203). He had corrective surgery in 1995, the injury was repaired, and he was able to return to normal work duties (TR 43, 204, 234).

– Current Injury, Restrictions and Crew Assignment –

At the time frame relevant to this grievance, there was a refueling outage at DCPP (TR 163-164). On October 27, the Grievant suffered a work-related injury while moving a piece of heavy equipment (TR 16-17, 40-41, 204-205, 207, 234). The Grievant was examined at the DCPP medical facility by Physician's Assistant Craig Gallagher (TR 16-17, 42-43,70, 207-208; JX 3, p. 48). Gallagher diagnosed an abdominal strain, prescribed ice and Advil, and sent the Grievant home (*Id.;* TR 44). Gallagher advised the Grievant to return in three days for a re-check, and to avoid lifting more than five pounds, bending, stooping or twisting (TR 17, 208-209; JX 3, p. 48).

On October 31, Gallagher again examined the Grievant (TR 17, 20, 210; JX 3, p. 39). The abdominal pain had improved, but the Grievant complained of other symptoms, including back and right hip pain (TR 17, 44). Gallagher imposed restrictions to avoid stairs, prolonged walking, lifting greater than ten pounds, and bending, stooping, kneeling or climbing. He instructed the Grievant to return for a re-check in a week. On his report, Gallagher wrote a note to the Grievant's supervisor at the time, stating "Bill [Grievant] now has some worsening complaints. He needs to reduce his activity!" (JX 3; p. 39; TR 17, 20, 210-211).

Because the Grievant was injured and unable to perform the heavier valve work being performed by his assigned crew during the refueling outage (TR 94), he was reassigned in late October to the foreign materials exclusion ("FME") crew, on light duty, under the supervision of Scott Hodgson (TR 78, 80, 93-94, 96, 211). Hodgson was aware the Grievant had medical work restrictions; he asked the Grievant for a copy of them and he received Gallagher's October 31 report (TR 94-95, 96; JX p. 39). A main responsibility of the FME crew is monitoring and accounting for items moving in and out of the high-risk area, in accordance with required procedures (TR 76-77).

On November 7, the Grievant returned to the DCPP medical facility for a re-check by Gallagher (TR 18, 19-20, 211; JX 3, p. 40). The Grievant's complaints had not improved, according to Gallagher (TR 18, 46). The Grievant testified his condition had declined (TR 212). Gallagher referred the Grievant to Dr. Newman, who had treated the Grievant for his earlier back injury (TR 239). Gallagher meanwhile continued the same work restrictions until the Grievant was released by his worker's compensation doctor (TR 19-20; JX 3, p. 40), and referred the Grievant for an x-ray, the results of which were negative (TR 47-48, 213).

Dr. Newman saw the Grievant on or about November 15 (TR 18, 46-48, 213-214; JX 3, p. 41). He diagnosed right hip sprain and right groin strain; ordered an MRI and physical therapy; and referred the Grievant to a surgeon, Dr. Anderson (TR 46-47, 215; JX 3, p. 41). Dr. Newman also continued the Grievant's medical restrictions in place, limiting lifting to ten pounds, no twisting, bending, stooping or kneeling, no climbing ladders (TR 48; JX 3, p. 41). Dr. Newman's work status report was faxed to the DCPP medical facility (TR 20). A second visit with Dr. Newman was scheduled for November 23 (TR 216; JX 3, pp. 41, 47).

Containment Assignment and Clarification of Medical Restrictions:

Hodgson testified that there came a point that he needed the Grievant to perform FME paperwork in the containment area (TR 26, 79), because he did not have other jobs to assign to the Grievant at that time (TR 79-80, 96-97, 114). As described further below, containment is an area with restricted access – a radiologically controlled area ("RCA"), where employees are required to wear protective clothing (TR 86, 161-164, 174-175; UX 16). Hodgson spoke to the Grievant about the job in containment (TR 98, 222). The Grievant objected to the assignment, telling Hodgson he could not perform the work due to his restrictions (TR 100-101, 222). Hodgson did not think that the stated work restrictions prohibited the Grievant from performing the FME desk job in containment.

Hodgson approached Gallagher to see if he could obtain clarification about the Grievant's work restrictions (TR 100, 114). Hodgson testified that, in making this inquiry, he was not seeking to change them (TR 117). Hodgson told Gallagher that he was seeking a work assignment the Grievant could perform within his existing restrictions; and that he had the FME desk job in containment in mind (TR 48). Hodgson asked Gallagher if the Grievant could perform that work (TR 51). Hodgson described what the assignment involved, including donning protective clothing, ascending 15 steps and sitting at a desk to do paperwork (TR 23, 26, 36, 48-49, 51, 86-87). Gallagher responded that the decision was up to Dr. Newman, the Grievant's treating physician (TR 24, 273-274); and that Dr. Newman would have to provide any clarification (TR 50).

Gallagher offered to contact Dr. Newman and make the inquiry about whether the Grievant could perform these duties (TR 24, 35). Gallagher called and spoke with Dr. Newman's worker's compensation nurse, explained the specific request with the details noted above about the

assignment, and asked to be advised if Dr. Newman thought the Grievant could perform that assignment (TR 24, 38, 53-54). The nurse later called back to advise that the Grievant could perform the work and that she would fax substantiating documentation (TR 24; JX 3, p. 42). Gallagher received a prescription form signed by Dr. Newman dated November 15 stating that the Grievant "(1) May put on coveralls and booties; (2) may ascend 15 steps once daily and descend once daily; (3) May perform paperwork at desk" (JX 3, p. 42).

At the hearing, Hodgson testified that the tasks involved in the FME desk assignment in containment were similar to the work the Grievant had been performing outside containment up to that point (TR 89). As noted above, the Grievant would have to put on protective clothing to enter the RCA (TR 164-165; UX 16). The protective clothing that was standard for the majority of employees in containment was outer coveralls, booties and galoshes, a pair of cotton liners, a pair of rubber gloves and a hood (TR 86-87, 117, 166, 167-168). The protective clothing must be put on in a certain way, though in no particular order (TR 167, 174). It must be removed in a particular order and manner, to avoid spreading any contamination (TR 37, 87-88, 103, 174, 175-181).

The Grievant does not dispute that the job in containment involved sitting at a desk to perform FME paperwork (TR 236, 237-238). There is no evidence that he took issue with the stairs. The record establishes the Grievant regularly climbed stairs without apparent difficulty for various work-related activities following his injury (TR 23, 240-241). The main issue from the Grievant's standpoint was the bending, stooping or twisting involved in donning and removing the protective clothing (TR 246). The Grievant testified, "There is no doubt in my mind" he would "have collapsed and ... had to have had emergency medical response" to get carried out on a stretcher if he had been required to put on and take off the anti-contamination clothing (TR 246; see also TR 224-225).

The Union presented the testimony of Union Representative Dan Lockwood, who had worked in containment prior to 1999, about the protective clothing and the physical effort required in putting it on and removing it (TR 162-168, 172, 174-181, 187).

It is undisputed that, while working on Hodgson's crew, the Grievant dressed himself in shoes, socks, pants, a button shirt, light jacket, and work boots with laces (TR 79, 242). He regularly wore pull-on paper coveralls with a zipper, that he stepped into (TR 79, 243-244). He had no issue putting on and taking off the regular coveralls (TR 246-247). In Hodgson and Gallagher's view, no significant bending, stooping or twisting was required in donning and removing the protective clothing for containment; rather, they viewed the activity as similar to getting dressed in regular clothing and the coveralls the Grievant commonly wore at work, except for the careful order and manner the items are required to be removed[3] (TR 51-52, 79, 98-102, 103; JX 3, p. 14, parag. 5). Further, Hodgson testified, Radiation Protection (RP) personnel are present around the clock during a refueling outage to greet those exiting containment, to monitor whether the protective clothing is removed correctly, and to assist, if needed, to ensure that no spread of radiation contamination occurs (TR 87, 103, 116, 117).

Events of November 17:

On the morning of November 17, Scott Hodgson brought the Grievant to a meeting with Gallagher to discuss Dr. Newman's clarification of the Grievant's work restrictions (TR 25, 82, 225-226). The meeting was brief, lasting approximately 10 minutes (TR 55, 226, 244). The three met in Gallagher's small office and were seated only a few feet from one another (TR 25, 54-55, 227,

[3] No order or contamination concerns apply to the removal of regular maintenance coveralls outside of the RCA (TR 105)

245). Gallagher sat at his desk; the Grievant and Hodgson sat next to each other (TR 25, 54, 83, 105, 245).

Gallagher explained Hodgson's request for clarification to the Grievant, including that he (Gallagher) had informed Hodgson the determination was up to Dr. Newman; that he (Gallagher) had contacted Dr. Newman about the matter and provided a description of the activities involved in the assignment; and that Dr. Newman's office had returned a form on which Dr. Newman indicated the Grievant could perform the job (TR 26, 56-57, 83, 268).

The Grievant recalls Hodgson addressing the matter, not Gallagher, but he does not dispute that he was told the above information and was shown the form from Dr. Newman (TR 225, 228, 244, 265; JX 3, p. 42).[4] The Grievant testified that he was "dumbfounded" and he expressed his disbelief (TR 228). According to the Grievant, he asked Gallagher to get his medical file and he (Grievant) went through each of the work restrictions with Hodgson and Gallagher (TR 228, 245). Gallagher and Hodgson recall discussing only the note, not the Grievant's whole medical file (TR 83-86, 268-269, 273, 274).

Gallagher and Hodgson both testified that the Grievant became "upset and agitated," stating that he would further injure himself if assigned these tasks and would have to be "med-vac'd out" (TR 26, 56, 83).

Gallagher's account of what happened next in the meeting is as follows: the Grievant looked him in the eye and stated, when this happened (being medi-vac'd out), Gallagher's "life as [he] knew it was over" (TR 27, 29, 58). Gallagher was shocked (TR 27) and concerned that the Grievant might

---

[4] Gallagher testified it was he, not Hodgson, who explained what had taken place and reviewed the form from Dr. Newman's office with the Grievant (TR 268).

harm him or his family (TR 28-29, 276). Gallagher asked the Grievant, "is that a threat?" The Grievant said "no, but for me to clearly understand when he gets medi-vac'd out, that my [Gallagher's] life as I know it is over" (TR 29, 57-58). According to Gallagher's, the Grievant had repeated the threat rather than retracting or explaining the statement (TR 31-32, 74, 269). Gallagher took both statements as threats to his personal well-being (TR 29, 73).

It is undisputed that, while the Grievant was making the above statements to Gallagher, Hodgson received a page, stood and went to the phone 3 to 5 feet away to return the call (TR 83, 105-106, 270). Hodgson's description of what the Grievant said to Gallagher is that the Grievant then leaned forward and said, "'This will be the end of your life' and then said in a lower, deep quieter voice, 'as you know it.' And then paused again and trailed off and said, 'at PG&E'" in an even lower and softer tone (TR 83-84).

According to both Hodgson and Gallagher, the Grievant spoke deliberately, without gesticulating or raising his voice (TR 90, 270; JX 3, p. 15). Hodgson discontinued making the telephone call and sat back down because, "It sounded like a threat" (TR 84). Hodgson corroborates that Gallagher took the statement as a threat at the time (TR 84) and asked the Grievant, "are you threatening me?" or "Is that a threat?" (TR 85). Hodgson corroborates Gallagher's testimony that the Grievant did not reply in a manner that reassured Gallagher that he was not threatening him. Hodgson heard the Grievant repeat only the statement that he would "have to be medi-vac'd out," not the statement about the end of Gallagher's life (TR 85, 91, 108).

Hodgson testified he took the Grievant's statement as a threat directed at Gallagher about his job (TR 92, 106-107). In the investigation by security, Hodgson wrote in his statement that he was

not sure if the Grievant's statement "was a threat or a complaint," though his statement includes that Gallagher clearly "took it as a threat" (JX 3, p. 44; see also JX 3, p. 26).

The Grievant's Testimony:

The Grievant testified he told Hodgson and Gallagher that the assignment in containment was inappropriate for his condition and injury; that had not heard of anyone with his injuries on light duty being assigned to work in containment; and that he "couldn't believe that my supervisor and a physician's assistant ... would go to my personal physician behind my back and get him to change my work restrictions" (TR 228-229).[5] He further testified, as follows, on direct examination about the incident:

> And that is when I said, "Well, the condition I am in and based on your own diagnosis and paperwork and doctors, I am going to get hurt in containment walking around and getting dressed, you are going to med-vac'd [sic] me out of there" (TR 229)

At that point Hodgson got the page (TR 229). The Grievant's testimony continues:

> ... I leaned forward so he [Hodgson] could get to the phone. And I told them both, although I was looking at Craig [Gallagher] , that would be the end of their lives at PG&E as they know it ...
>
> * * *
>
> Q. [on direct examination] Do you recall if Mr. Gallagher asked you if you were threatening him?
>
> A. Yes. He stopped and looked at me and he goes, "He threatened me. He threatened me." He was looking at Scott Hodgson.
>
> I said, "Craig, sit down. No one is threatening you. I am not threatening you. It's preposterous. (TR 230)

On cross-examination, when asked if he made the "end of life as you know it" statement once or twice, the Grievant did not recall (TR 253). On further cross-examination, the Grievant described his response to Gallagher's question, as follows:

---

[5] Gallagher testified that he often contacted treating physicians, and that he was not required to contact the patient before doing so (TR 52-53).

> ... words to the effect of "No, Craig, you are not being threatened" or "I am not threatening you and that is ridiculous" or "preposterous." (TR 256-257; see also TR 252-253, 255)[6]

The meeting ended shortly thereafter (TR 55, 110-111). The Grievant recalls saying "to Craig and Scott that this is all cleared up now" (TR 230) and "you are both okay" (TR 255), and that Gallagher answered, "Yes" (TR 256).

The Grievant's signed statement in the investigation differs from his hearing testimony in a couple of pertinent respects. First, his statement plainly and specifically states he said "**to Craig Gallagher**" (not to both Hodgson and Gallagher): "**Craig**, if you would intentionally hurt me it would the end of life at PG&E as you know it ..." (Emphasis added.) (JX 3, pp. 25, 29; TR 250-251). Second, his statement acknowledges that "Gallagher asked me, 'Are you threatening me" to which the Grievant claims he replied, "No, that's ridiculous, if I as a PG&E employee hurt someone it would be the end of my life at PG&E as I know it, too" JX 3, p. 29). These prior inconsistent statements cast a cloud on the credibility of the Grievant's testimony at the hearing.

On re-direct examination, the Grievant testified, as follows:

> MR. NATHAN: Q. Mr. H , you were asked on direct about all of this training and counseling you had received several years ago, do you recall that?
> A. Yes.
> Q. Was it your understanding that you acted contrary to anything that you learned at that time in this conversation with Mr. Gallagher and Mr. Hodgson?
> A. Never.
> Q. Were you trying to threaten them?
> A. Absolutely not. I made that clear to them. (TR 266-267)

---

[6] Both Gallagher and Hodgson testified the Grievant offered no disclaimer or explanation in response to his question about being threatened (TR 71, 74, 85-86, 114, 269). Further, neither recalls the Grievant ever using the word "ridiculous" or "preposterous" in the conversation (TR 31-32, 89-90, 269).

Subsequent Events:

When the Grievant saw Dr. Newman on November 23, the doctor modified his work status report to state, "Do not wear anticontamination clothing" (JX 3, p. 47; TR 63-64, 216, 266). The Union presented the Grievant's testimony and a series of exhibits establishing the subsequent continuing medical treatment he received (TR 217-221; *e.g.* UX 2, 4, 6, 7, 12, 14). The evidence has been reviewed, but it is unnecessary to summarize it here. The Board does not have jurisdiction to make any determination about the Grievant's medical status.

Gallagher continued to feel threatened following the meeting (TR 66, 276). He took personal measures to protect himself and his family following the incident (TR 31, 64, 88, 276). Gallagher and Hodgson took the incident seriously enough to report it and document it immediately (TR 29, 32, 33, 35, 72, 88, 112, 275-276; JX 3, p. 73).

The Company promptly commenced a Corporate Security investigation, which included interviewing Gallagher, Hodgson and the Grievant about the incident (JX 3, pp. 25-30, 73; TR 33, 255, 276). The Company investigation concluded that the Grievant had "intentionally made a threatening statement to intimidate Gallagher in an attempt to avoid working a light duty assignment inside containment" at DCPP, in violation of applicable employee conduct policies and standards (JX 3, p. 27).

Human Resources conferred with Margaret Short, Manager of Labor Contracts in determining the appropriate level of discipline for the incident (TR 137). Short is the Company spokesperson for precedent-setting levels of the grievance procedure and is consulted by Labor Relations and Human Resources regarding discharge and DML recommendations, the two highest levels of discipline (TR 137). Short testified that she concurred in the decision to terminate, taking

into consideration the following factors: the Company takes all threats as a serious transgression of the employment relationship (TR 137); the Grievant, like other employees at DCPP, must meet the special requirements and higher standards applicable to such a specially regulated facility (TR 138-140); and the threat was made to a third party,[7] making it more serious than some workplace disputes (TR 139). Short also considered how other employees who engaged in threatening behavior have been disciplined (TR 139); and the fact that the Grievant had been specifically trained and mentored on workplace standards and expectations (TR 139). Accordingly, the Grievant was terminated effective January 17, 2006 (JX 3, p. 23-24).

POSITIONS OF THE PARTIES

The Company:

» Under the Collective Bargaining Agreement, the Company has the right to terminate an individuals' employment for just cause. The Grievant's termination is supported by just cause and is consistent with prior precedential arbitration decisions.

» The rule prohibiting threatening conduct in the workplace is reasonably related to the efficient and safe operations of the Company's business. Safety is a particular concern in the operation of a nuclear power plant such as DCPP.

» The NRC mandates that employees with access to the protected area of a nuclear plant be reliable, trustworthy and safe. Their access can be revoked if their conduct is inconsistent with this standard. They receive periodic training and background checks.

---

[7] Craig Gallagher is a Physician's Assistant, who was a service provider in the medical at DCPP at the time of the events at issue, employed by a subcontractor, Concentra (TR 13-16, 34, 141).

» The Grievant received annual DCPP employee conduct and ethics training, as well as additional individualized training and mentoring on standards of conduct and interpersonal communication. He had personal knowledge of the behavioral expectations for DCPP employees and of the consequences for violating those standards.

» The Company conducted a fair and objective investigation prior to administering discipline.

» Substantial evidence establishes that the Grievant threatened Gallagher in violation of DCPP and Company standards of conduct. Gallagher and Hodgson both credibly testified that he did. The Grievant's choice of words was deliberate, and he failed to apologize or deny the threat when provided the opportunity to do so. The Grievant's conduct shows an intent to intimidate.

» Gallagher was seriously concerned about the threat. His actions at the time demonstrate this.

» The severity of the Grievant's conduct warrants termination, particularly in light of the personalized training he had received. The evidence shows that the Grievant specifically threatened an individual at a nuclear power plant. The Company properly viewed this conduct as sufficiently serious to impose discharge. It was the appropriate level of discipline.

» Gallagher should not be required to work with an individual who causes him to fear for his life or safety. Regardless of years of service, the Company should not be required to tolerate the presence of an employee who bullies others or threatens their health or safety.

» The Grievant was treated similarly to other employees who have engaged in comparable misconduct, for example Arbitration Cases 241 and 246, both decided by Arbitrator McKay.

» The Grievant's medical condition does not shield him from discipline or justify his misconduct. He had appropriate methods to state his position with respect to any work restrictions.

His remedy was not to threaten Gallagher. Any effort to excuse his behavior based on his injury or the conditions in containment should be rejected.

» The Company did not violate the Collective Bargaining Agreement when it terminated the Grievant for threatening Gallagher. The grievance must be denied.

The Union:

» This grievance should never have been necessary. Characterizing what the Grievant said as a threat represents a gross distortion of his comments. The Grievant's statement was not a threat, and was not intended as a threat. He was merely trying to point out the assignment to containment was an unsound decision because he could get hurt and would have to be medically evacuated. If this happened, it would reflect poorly on Gallagher and Hodgson. While he arguably used an inartful choice of words, it is preposterous to conclude that he was threatening either Gallagher or Hodgson. The most that can be said is that his words were misunderstood.

» The Collective Bargaining Agreement requires a finding of just cause for termination. There must be a substantial and rational basis for ending the work life of a long-term employee who has no active discipline. Under any definition of just cause, the discharge was not appropriate.

» The Company has the burden of proving the Grievant's conduct warranted termination. Given the nature of the charges, actual or threatened violent behavior against another individual, the Company must prove the allegation by clear and convincing evidence. The Company's own evidence fails to demonstrate a threat was made.

» Hodgson's recollection is largely consistent with the Grievant's recollections. Hodgson confirms the Grievant included the words "at PG&E" in his remark. Hodgson's statement in the investigation was that he was unsure if the Grievant's comment was a complaint or a threat.

Hodgson's statement is more credible than his hearing testimony. To the extent Hodgson later testified the Grievant's comment was a threat, it was a threat to Gallagher's livelihood, not his person. The Grievant did not have authority to impact Gallagher's job (TR 107-108).

» Gallagher did not hear the Grievant's full statement; he missed the important words "at PG&E." This led to his mistaken belief that the Grievant had threatened his physical well-being. Gallagher admitted he may have missed those words because he was upset and his mind was "reeling" after hearing the first part of the statement.

» When Gallagher asked if he was threatening him, the Grievant denied doing so. The Grievant made it clear that he was not threatening him. Gallagher is mistaken that the Grievant repeated the alleged threat. Hodgson testified the Grievant did not repeat the initial remark that was deemed threatening by Gallagher. Given Gallagher's state of agitation, he is less credible on this point than Hodgson.

» The Grievant was understandably concerned for his safety based on how he was being treated on November 17. Hodgson decided unilaterally to go around the Grievant and get an interpretation of his work restrictions that would allow him to be assigned to containment. Gallagher and Hodgson manipulated the data provided to Dr. Newman to meet their goal. After seeing the Grievant on November 23 and gaining a fuller understanding of what was involved, Dr. Newman altered the restrictions to prohibit requiring the Grievant to wear anticontamination clothing.

» Margaret Short's testimony implies that the Grievant's conduct would normally warrant discipline short of discharge, but for the three factors she stated (higher standard of conduct for employees at DCPP; Grievant had once been given extra training; and Gallagher was technically an

employee of a third party provider). None of these reasons amounts to just cause or suffices to change the outcome to termination.

» The Company has failed to prove the charge that the Grievant engaged in actual or threatened violent conduct. While the Grievant was blunt and perhaps used a poor choice of words, he had no intent to threaten anyone and did not in fact threaten anyone. Given the circumstances of his past injuries and the attempt to maneuver him into working in containment, the Grievant was fully justified in trying to make his position clear.

» Even if the Grievant is found to have made a negative or inappropriate choice of words, this is insufficient to warrant discharge. There was no evidence that the Grievant was about to take any action or engage in any improper physical behavior. He was not angry or out-of-control at the time of the incident; rather, he was speaking in his normal manner.

» Pursuant to numerous precedents between the Parties, discharge was improper. The Union has uncovered no case in which such innocuous behavior has ever resulted in a discharge. In Arbitration Case No. 227, discharge was imposed by the Company because the grievant had crossed the line and engaged in a physical assault. Absent that, he would have received a DML even though he had an active written reminder at the time. A review of several other cases shows lighter discipline has been imposed for more serious misconduct than proven here.

» Under the Positive Discipline Agreement (PDA) (UX 15), the Grievant should not have been terminated for a first time offense. The policy "focuses on communicating an expectation of change and improvement in a personal, adult, non-threatening way" (UX 15, p. 4). Even if it is found that the Grievant's words were inappropriate, he should have been provided an opportunity to change before getting to the point of termination. The policy also requires consideration of mitigating

factors. There is no evidence that occurred here. Instead, irrelevant factors at odds with the PDA were given weight. This discharge violates both the spirit and the letter of the PDA.

» The Company's reliance on the Grievant's receipt of training some years prior to the incident was improper. The issue should never have been raised. The discipline should stand or fall on the evidence of what occurred on November 17.

» The Company asserts that a higher standard of conduct applies to employees of DCPP as compared with other Company employees. Nothing in the Collective Bargaining Agreement or PDA calls for disparate treatment of DCPP employees. For this reason, also, the grievance should be upheld.

» The fact that Gallagher was technically employed by a third party provider is another reason cited by Short for treating the Grievant more harshly than other employees accused of similar misconduct. This exalts form over substance. In all but name, Gallagher was a Company employee. Further, there is no justification for this factor to have increased the severity of the discipline imposed.

» Upholding this discharge would do an injustice to the Grievant and set an intolerable precedent. For all these reasons, the grievance must be sustained and a full, make-whole remedy awarded.

DISCUSSION

Standard of Conduct:

Engaging in "actual or threatened violent conduct" is specifically prohibited by the Employee Conduct Summary and violations are subject to discipline up to and including termination (JX 3, p. 34). Well-established arbitral authority holds that such threats are serious misconduct that can warrant summary termination.

In Arbitration Case No. 241 (McKay: June 19, 2000), discharge was imposed by the Company and upheld in arbitration for threatening behavior (leaving bullets at the door of a manager). This case did not involve a face-to-face threat, and did not occur at a nuclear facility, yet the threatening act was sufficiently serious to warrant discharge.

In Arbitration Case. No. 246 (McKay: January 28, 2002), also a case that did not involve a face-to-face threat or a nuclear facility, the opinion states:

> It is the Arbitrator's opinion that employees and supervisors have a right to work free of intimidation and threats. No employee should have to go to work in a situation where the employee fears for his life or the safety and health of his family. ...
>
> ...No Employer has to tolerate the presence of employees who chose, as a matter of interaction, to threaten the health and safety of co-workers."
>
> (at p. 16)

In Arbitration Case No. 227 (McKay: December 21, 1998), discharge was sustained in a case involving not only verbal misconduct but physical violence (at pp. 20, 23-24). The opinion in that case notes the heightened awareness of preventing violence from occurring in the workplace (at pp. 20-21).

The Board finds this line of recent precedent persuasive. The relatively lighter discipline imposed for threats in cases sited by the Union, dating back some 20 to 30 years ago, is less so.

The evolution of standards governing threats of violence in the workplace is acknowledged in the professional literature. As stated in *The Common Law of the Workplace, 2nd Ed.* Theodore St. Antoine, Ed. (BNA: 2005):

> Concern about violence in the workplace has grown in recent years. At a minimum, management has a right to establish policies to avert workplace violence. ... Under such policies, employees who threaten physical violence may be subject to the same discipline, including discharge, as employees who commit acts of violence. (at pp. 312-313)

Thus, in appropriate cases, an employer is entitled to take serious disciplinary action up to and including discharge based upon the occurrence of a threat, and need not wait for an escalation into actual violence.

Specific Notice:

The Grievant testified that he was familiar with the Employee Conduct Summary and the discrimination and harassment-free workplace policies. He had actual knowledge that threats were prohibited. He has received training on these policies governing appropriate standards of behavior in the workplace (TR 128, 129, 130, 231; JX 3, p. 34).

In 2002, the Grievant received specific instruction from a supervisor to review these policies and to avoid reacting in an intimidating manner. In addition, he was sent to an outside individual, at Company expense, to improve his interpersonal style at work (TR 264). This consultation was designed to help him understand how other people perceive him when he speaks with them in a threatening or intimidating manner, and how to improve his interpersonal communication skills to avoid being perceived as intimidating or threatening (TR 265) (See also TR 130, 136). The Grievant was also assigned a mentor to assist him in understanding the requirements and standards of behavior at DCPP (TR 164-265).

The evidence, therefore, amply supports a finding that the Grievant had clear and specific notice of the applicable standards, in general, and the need to refrain from intimidating or threatening words, in particular. The Union's contention that this personal notice and training are irrelevant, or inappropriate to consider, are rejected. Standard elements of just cause include whether the rule being applied is reasonable, and whether the disciplined employee had prior notice of the rule.

The Company takes the position that safety is a particular concern in the operation of a nuclear power plant such as DCPP. The Union contends the Company is unfairly applying a higher standard of conduct to the Grievant. Improper disparate treatment occurs when there is no rational, non-discriminatory basis for drawing a distinction between one employee, or group of employees, and another. There are rational and regulatory reasons for employees of a nuclear power plant to be held to strict standards of safe conduct.

The standard of just cause does not require blindness to the particular employment context in which an incident occurs. To the contrary, arbitrators commonly consider the nature of the particular work setting, particularly when safety issues are involved. It is also significant to note that the recent line of arbitration awards, cited above, show that other Company employees, including those who did not work at DCPP, have been terminated for threatening behavior. For these reasons, the contention that the Grievant has been unfairly subjected to improper disparate treatment in the application of the Company's behavior standards is not accepted.

Credibility Resolutions:

The Union accurately points out that there are differences in the recollection of the three percipient witnesses. It uses this fact to attack Gallagher's credibility. Differences in the recollection of witnesses to the same event are not unusual and do not necessarily signal a lack of

credibility. What the record plainly shows, however, is that the Grievant is the least credible of the three in his account of the November meeting. His story has shifted and been embellished, as contrasted with the more credible and internally consistent accounts of the Company's main witnesses. Gallagher's version of events has been particularly clear and consistent from the date of the incident. He is found to be a credible witness. His testimony is summarized hereinabove and need not be reiterated here.

The Union points out that Gallagher did not hear the Grievant state the words "at PG&E" at the end of the sentence, as Hodgson did (TR 61, 74), and contends that he (Gallagher) misunderstood the Grievant's comment as a result. The Union further argues that, because it was a misunderstanding, Gallagher's perception of a threat is irrelevant. Gallagher candidly acknowledged he found the threat concerning his life to be so shocking and upsetting that he may have missed the additional words (TR 61-62).

The Union's attempt to minimize the threat by emphasizing the importance of the words "at PG&E" is unpersuasive. The threat expressly referencing the end of Gallagher's life was reasonably perceived as a threat to his personal well-being. The inclusion of the words"at PG&E", which the Grievant mumbled in a low voice at the end of the remark and Gallagher did not hear, does not neutralize the personally menacing character of the main thrust of the sentence. It is still a threat. Having chosen to speak in intimidating terms implicating Gallagher's life, the Grievant acted at his peril if Gallagher missed the words "at PG&E," whether because they were spoken in a low voice or due to shock or upset at the central content of the remark.

The Union relies heavily on Hodgson's credibility, because he heard "at PG&E" and he did not hear the Grievant repeat the threat, as Gallagher did. At the same time, the Union attacks

Hodgson's credibility based on the statement in the investigation that he was unsure if the Grievant was making a complaint or a threat. The latter comment in the investigation statement does not undermine Hodgson's credibility. It merely expresses Hodgson's uncertainty as to the Grievant's exact intent. In the investigation and in his hearing testimony, Hodgson has been consistent and credible in his account of the incident. He substantially corroborates Gallagher in a number of significant respects, including that Gallagher took the remark as a threat at the time and that Hodgson shared a concern that the remark sounded like a threat (TR 84). Hodgson's testimony supports the reasonableness of Gallagher's perception.

There is no question that Gallagher felt threatened by the Grievant's conduct in the meeting, and asked the Grievant at the time if it was a threat. Gallagher has been consistent from the date of the incident on the point that the Grievant repeated the threat in response to his question. This testimony is credited, and underscores that the Grievant possessed a deliberate intent to intimidate.

The Grievant does not deny uttering the statement twice; he simply does not recall (TR 253). His description of how he responded to Gallagher's question has shifted and changed. In an earlier statement, the Grievant admitted responding with another "end of life at PG&E" albeit purportedly relating to himself (JX 3, p. 29). Other responses he describes in his hearing testimony (summarized hereinabove) are flatly refuted by both Gallagher and Hodgson (TR 89-90, 269).

The fact that Hodgson did not hear the repetition of the threatening comment does not support a finding that it did not occur. Hodgson did not hear the Grievant's initial response of "No," either (TR 85). The record supports a finding that Hodgson did not hear everything the Grievant stated at that particular point, because he was distracted. It is undisputed that he had been paged, gotten up, moved behind the Grievant, and started to make a phone call (TR 229-230, 253-254, 254-

255, 270). Gallagher, as the person sitting face-to-face with the Grievant, and to whom the statements were being directed, is found to be the most reliable witness on this point.

Accordingly, the Board finds that the Company has met its burden by clear and convincing evidence that the Grievant threatened Gallagher on November 17.

Level of Discipline:

The final question is whether the imposition of termination violated the Collective Bargaining Agreement or the PDA, such that the penalty must be reduced. As discussed above, severe discipline, up to and including termination, may be imposed for a threat of this nature. The question is whether termination is the appropriate level of discipline in this particular case.

In terms of mitigating factors, the Union relies upon the Grievant's length of service. This factor is a double-edged sword, in that an employee with the Grievant's training and experience knows or ought to know that this type of conduct cannot be tolerated in the workplace. As Arbitrator McKay found in Arbitration Case No. 246, length of service is not sufficient to require the continued employment of an individual who threatens the life or safety of others (at p. 16).

The Union contends that Gallagher and Hodgson's treatment of the Grievant was inappropriate; that the Grievant legitimately feared re-injury and was justifiably upset by their efforts to maneuver him into the assignment in containment. However, the evidence fails to show that Gallagher and Hodgson improperly provoked in any way that would justify or excuse the Grievant's threatening behavior on November 17. The Grievant could have chosen appropriate words to state his concerns. He deliberately chose an intimidating way of expressing himself. Legitimate avenues were available for the Grievant to press his position, for example, requesting a Union representative; asking to see the doctor; requesting that the decision be postponed until he had an opportunity to be

re-examined or to provide additional information to Dr. Newman; requesting accommodation by RP personnel to assist him in putting on and removing the protective clothing. His recourse was not to intimidate and threaten Gallagher.

A number of factors weigh against mitigation, including (a) the incident occurred at a nuclear power plant facility, where safety is of prime concern; (b) the threat was made deliberately, in a face-to-face meeting with a medical professional who did not provoke the Grievant with any belligerent conduct; (c) when asked if the statement was a threat, the Grievant repeated the threat rather than retracting it or explaining his comment; (d) the Grievant had specific notice and training that this type of conduct was unacceptable in the workplace, that it could lead to discipline up to and including termination, and further that he had to monitor his personal style of interaction to avoid behavior that could be interpreted by others as intimidating or threatening; and (e) even by the end of the arbitration hearing, the Grievant failed to recognize anything objectionable about his behavior in this incident (see quoted testimony above) (TR 266-267). An employee cannot be expected to change that which he fails to acknowledge. The fact that the Grievant engaged in intimidating conduct after receiving special training about avoiding it indicates he is either unwilling or unable to control this type of behavior. The foregoing factors show that risk of recurrence is high, and dictate against a reduction in the penalty in this particular case.

Accordingly, the following decision is rendered.

DECISION

Grievant H. was terminated for just cause. The grievance is denied.

Company Board Member — CONCUR / DISSENT — 6-25-08 Date

Company Board Member — CONCUR / DISSENT — 6/17/08 Date

Union Board Member — CONCUR / DISSENT — 6/26/2008 Date

Union Board Member — CONCUR / DISSENT — 7/8/2008 Date

Neutral Board Member — CONCUR / DISSENT — June 4, 2008 Date